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# In the Supreme Court of the United States

OCTOBER TERM, 1978

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CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

*v.*

STATE OF IDAHO, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATE OF IDAHO, ET AL.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a) is not yet reported. The opinion of the district court (App. B, *infra*, 2a-29a) is reported at 417 F. Supp. 873. The opinion of the Interior Board of Land Appeals (App. C, *infra*, 30a-38a) is reported at 21 IBLA 210.

## JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 43a) was entered on April 19, 1979. Mr. Justice Stevens subsequently entered an order enlarging the time in which to petition for certiorari to August 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Carey Act, as amended, 43 U.S.C. 641, requires the Secretary of the Interior indefinitely to reserve from appropriation to other public or private uses some 2.4 million acres of desert land within Idaho for the eventuality that the State may be able and willing to select all or any part of such acreage for irrigation and reclamation under the Act.

## STATUTES INVOLVED

The Carey Act of August 18, 1894, ch. 301, Section 4, 28 Stat. 422, 43 U.S.C. 641, provides:

> To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is, as of August 18, 1894, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act approved March 3, 1877, and the Act amendatory thereof, approved



> March 3, 1891, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the desert-land law, within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if actual construction of reclamation works is not begun within three years after the segregation of the lands or within such further period not exceeding three years, as shall be allowed by the Secretary of the Interior, the said Secretary of the Interior, in his discretion, may restore such lands to the public domain; and if the State fails, within ten years from the date of such segregation, to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period not exceeding five years, or may, in his discretion, restore such lands not irrigated and reclaimed to the public domain upon the expiration of the ten-year period or of any extension thereof.
>
> Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated

irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation.

Any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State.

The Act of March 15, 1910, ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) 643, provides: [1]

[1] This statute was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2792.



To aid in carrying out the purposes of section 641 of this title, it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: *Provided*, That if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made.

## STATEMENT

1. The Carey Act, Section 4 of the Act of August 18, 1894, ch. 301, 28 Stat. 422, 43 U.S.C. 641, authorizes the Secretary of the Interior, with the approval of the President, to contract to grant and patent "desert lands" to any state in which there are such lands, in exchange for the state's agreement, among other things, to cause such lands to be irrigated, reclaimed, cultivated, and settled.[2] After a state's application for a grant has been approved, the land is segregated from the public domain for a period of from three to 15 years for the pur-

[2] "Desert land" is land which will not yield an agricultural crop without irrigation. See 43 U.S.C. 322, 641 (para. 1).

pose of allowing the state to cause an adequate irrigation system to be constructed and a sufficient water supply to be made available. Upon satisfactory proof that the conditions of the contract have been fulfilled, patents must be issued to the state or its assigns for the land reclaimed and settled. Originally, no state could receive more than one million acres of land for Carey Act development. In 1908, however, Congress raised the ceiling for Idaho to three million acres. See Act of May 27, 1908, ch. 200, Section 1, 35 Stat. 347, 43 U.S.C. 645; Pub. Res. 28, 35 Stat. 577; see generally 42 Fed. Reg. 18100 (1977) (Carey Act regulations).

In 1910, the Secretary was authorized to withdraw desert lands temporarily from the public domain upon request by a state but prior to its submission of a formal plan under the Carey Act. Act of March 15, 1910, ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) 643.[3] This legislation was added to prevent speculative filings on land contemplated by a state for a Carey Act project. S. Rep. No. 367, 61st Cong., 2d Sess. 1 (1910); H.R. Rep. No. 662, 61st Cong., 2d Sess. 1 (1910).

No state has reached its ceiling of land permitted under the Act. To date, Idaho has received approximately 600,000 acres of land under the Act. See

[3] After the district court's decision and judgment, this provision was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2792. Section 204 of FLPMA, 43 U.S.C. 1714, however, gave the Secretary general authority to make withdrawals.



Report of the Director of the Bureau of Land Management Table 114 (1952) (the most current report on the Carey Act). Most patents under the Carey Act were issued in the early years of this century when water sources were still conveniently located to arid land. As water sources become increasingly unavailable to arid lands, new Carey Act projects began to dwindle and by 1952 were all but nonexistent. Recent improvements in technology for pumping water from deep wells and river canyons, however, have revived interest in Carey Act developments in Idaho.[4]

2. In 1974, the State of Idaho, invoking Section 643, requested that the Secretary withdraw temporarily a specified tract of 27,400 acres in Idaho pending the State's submission of a proposed development under Section 641. On January 24, 1975, the Bureau of Land Management rejected the application for a temporary withdrawal because the land had been withdrawn for other purposes including, as to some of the land, stock-driveway purposes (App. C, *infra*, 31a, 33a).[5] The State appealed BLM's action to

[4] We are informed that the State of Nevada has received a large number of applications from Nevada residents requesting Carey Act developments. The State, in turn, is expected to soon make applications to the Secretary under the Carey Act.

[5] Under the authority of 43 U.S.C. (1970 ed.) 141; Exec. Order No. 10355, 17 Fed. Reg. 4831 (1952), the Secretary withdrew the lands in 1955 for driveways for stock. See Act of December 29, 1916, ch. 9, 39 Stat. 865, 43 U.S.C. (1970 ed.) 300, repealed and replaced by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Sections 204, 704(a), 90 Stat. 2792, 43 U.S.C. 1714; 43 C.F.R. 2313.1(c) (stock driveways).

the Interior Board of Lands Appeals only with respect to the lands withdrawn for stock-driveway purposes (*id.* at 33a). The State simultaneously petitioned the Board, pursuant to Section 7 of the Taylor Grazing Act, 43 U.S.C. 315f, to classify the tract as suitable for development under the Carey Act (*id.* at 34a).

The State argued that the Carey Act gave Idaho the right to three million acres of public land for Carey Act developments and that this right vested in 1894 when the Act became law and takes precedence over subsequent withdrawals and uses (*id.* at 36a). Accordingly, the State contended that the Secretary has no discretion under Section 643 to deny Idaho's request so long as the lands requested were desert lands (*ibid.*). On July 31, 1975, however, the Board held that Section 641 "is couched in discretionary language authorizing and empowering—not requiring—the Secretary to contract and agree with the states to donate, grant, and patent lands" (*ibid.*). The Board affirmed the refusal to withdraw the lands and directed the petition for classification to the BLM for initial consideration (*id.* at 38a).

3. On February 21, 1975, the State filed the present action in the United States District Court for the District of Idaho against the Secretary of the Interior. The complaint alleged that the Secretary had notified the State (i) that he would not allow "requests for segregation or withdrawal under the Carey Act as a matter of right" and (ii) that he had the authority to refuse to convey lands under the Carey Act even though they are in fact desert lands



and suitable for agricultural use (Compl. at 2). The complaint sought a declaratory judgment that the Secretary's policy violated the Carey Act.[6]

On summary judgment the district court agreed with the Secretary that the Carey Act did not make a grant in praesenti to the State, and that the State did not have an unbridled right to select any desert land for Carey Act development (App. B, *infra*, 18a). The court also held that if the State is denied an application for land for Carey Act development because that land has been withdrawn for some other use, the State's remedy is to petition the Secretary to open that land for Carey Act development, and that the Secretary's decision, once final, is reviewable in the courts (*id.* at 19a). The court, however, accepted Idaho's basic claim, holding that the Carey Act "conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement" and that the Secretary must preserve enough desert land to satisfy this right (*id.* at 18a-19a):

> The State is guaranteed a maximum entitlement of three million acres of suitable desert land for Carey Act development to select from time to time, which it cannot be deprived of by the Secretary of the Interior, if the State meets the conditions of the Carey Act. However, the State

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[6] The complaint also alleged that another policy of the Secretary concerning the amount of acreage available to a family violated the Act (Compl. at 3-4). The courts below decided this issue against the Secretary. We do not seek certiorari on this issue.

> may not perfunctorily select acreage previously withdrawn for other purposes such as in this case a withdrawal for stock-driveways. *The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act.* [Emphasis added.]

The court entered a judgment against the Secretary that "ordered, adjudged and declared" that Idaho "is entitled to have withdrawn and patented three million acres of the desert lands in the public domain (as reduced by prior patents issued pursuant to the Carey Act) situate in the State of Idaho for entry under said Act, providing that there are sufficient lands of such kind, quality and character within the State of Idaho, and providing that the State of Idaho satisfies all the terms and conditions of said Act * * *" (App. D, *infra*, 40a). The Secretary and the State both appealed. On April 19, 1979, the Ninth Circuit affirmed in a one-sentence opinion (App. A, *infra*, 1a).

## REASONS FOR GRANTING THE PETITION

1. The decision below is incorrect. The Carey Act merely authorizes the Secretary of the Interior, in his discretion and subject to the approval of the President, to enter into contracts to grant land to the states: the Act does not require the Secretary and the President to grant the maximum acreage authorized to each state. The text of the statute, its legislative history, and consistent administrative practice, all support this conclusion.



*a.* First, the language of the statute is permissive—not mandatory. The Secretary is "authorized and empowered" to contract to grant desert land to the state when certain conditions are fulfilled. It does not follow that where the conditions are met the Secretary *must* make the grant. To "authorize" administrative action is not to require that it be taken. See, *e.g.*, *Jay* v. *Boyd*, 351 U.S. 345 (1956); *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976).

This is all the clearer here because Congress in the same breath used the word "binding" to describe the contract. Congress clearly intended the contract, once made, to be binding, but, equally clearly, gave the Secretary discretion whether or not to enter into such a contract in the first place. The Secretary, moreover, may grant "not exceeding" three million acres to the state. Had Congress intended to confer an inchoate right to three million acres, subject only to the availability of "suitable" land and irrigation, cultivation and settlement of the land, the phrase "not exceeding" would have no place. "Not exceeding" reflects the discretion to grant less than three million acres even where the statutory conditions are met.

Furthermore, the President must "approve" all contracts under the Act. No criteria, however, are specified to guide the President. Inasmuch as it is unlikely that the President's approval was required simply to confirm the Secretary's factual determination that the statutory requirements are met, the pro-

vision for the President's concurrence must have been intended to insure that, considering all relevant factors of public policy, release of the land was in the public interest.

There is still another textual pointer. Even when a binding contract is made, the Secretary may "in his discretion" restore segregated land to the public domain if actual construction of reclamation works is not begun within three years of the segregation. This power is inconsistent with any "right" of the state to the land upon its mere say-so that it intends to develop it.

The plain language of the statute thus defeats any right of Idaho to take up to three million acres of suitable public land. Certainly, there is nothing in the Carey Act that overcomes the presumption against statutory grants of the public domain. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978).

*b.* The legislative history of the Carey Act is entirely consistent with the indications of the text. Two proposals were considered. The Senate bill would have "reserved" outright one million acres for each state, to be selected by the state within ten years of the bill's passage. See 26 Cong. Rec. 8388 (1894). This bill was not enacted. The House proposal, which eventually became the law, made no grant at all. As Representative McRae, its sponsor, observed when the House proposal was being considered on the floor as a substitute for the Senate bill (26 Cong. Rec. 8391):

> Now, Mr. Speaker, I want to state briefly what I understand to be the main difference be-



tween the two propositions. The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period. It leaves the question of irrigation to be determined under rules and regulations to be made by the States themselves. In short, the States will decide whether they have complied with the conditions as to irrigation. The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated for the reclamation of not exceeding a million acres in each State, the question of irrigation to be finally determined by the Executive officers of this Government. No reservation or withdrawal is permitted except for temporary purposes until the plan is approved; and no title is to pass until thorough irrigation is accomplished and shown to the satisfaction of the Interior Department.

In sum, the Carey Act was simply intended to authorize the Secretary to make such grants and thus enlarges the menu of uses available for public land use management.[7] The Secretary is free, so far as the Carey Act is concerned, to devote public lands

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[7] Arguably, a refusal by the Secretary to classify lands for Carey Act development is final agency action reviewable under the Administrative Procedure Act, 5 U.S.C. 704. But see *Bronken* v. *Morton*, 473 F.2d 790, 795 (9th Cir.), cert. denied, 414 U.S. 828 (1973). At most, however, such a refusal could be set aside only if it were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

to wholly different uses. The courts below thus erred in holding that the State was absolutely entitled, one way or another, to three million acres of land for Carey Act projects and the Secretary is obliged to preserve enough desert land for such developments in each state.[8]

*c.* Finally, the long standing and consistent administrative interpretation of the Act by the Secretary of the Interior has been that federal acceptance of a state development contract under the Act is "wholly within the discretion of the Department":

> It is clear from the terms of the act of August 18, 1894, * * * that the acceptance of the offer of the State is a matter wholly within the discretion of the Department. The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescence of both parties thereto without a right in either to insist upon a proffer or acceptance by the other.

*State of Wyoming*, 36 Pub. Lands Dec. 399 (1908). Accord, *Yakima Development Co.* v. *State of Washington*, 34 Pub. Lands Dec. 453, 455-456 (1906).

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[8] The court did not offer any specific basis for its conclusion that the Secretary is obliged to preserve enough land in each state for Carey Act development. The court evidently placed some reliance on this Court's statement in *Idaho Irrigation Co.* v. *Gooding*, 265 U.S. 518, 521 (1924), that "[b]y the Carey Act the United States *binds itself* to donate" desert lands to states. This was not even a dictum and was simply part of a brief statement of the background of *Gooding*. The Court in *Gooding* plainly did not intend to address the issue presented by our petition.



This construction—which has never previously been questioned in any litigation—by the agency charged with the principal responsibility for "regulating the acquisition of rights in the public lands" is entitled to considerable deference. *Andrus* v. *Charlestone Stone Products Co.*, *supra*, 436 U.S. at 613-614; *Udall* v. *Tallman*, 380 U.S. 1, 18 (1965); *Cameron* v. *United States*, 252 U.S. 450, 460 (1920). Significantly, when Congress amended the Act several times after the Interior Department decisions cited above were issued, it did not disapprove of Interior's interpretation. We may conclude that the Secretary was not violating his statutory mandate. See, *e.g.*, *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 13; *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8-9.

2. The decision below will have a severe impact on the Secretary's management of public lands. Idaho has thus far used only .6 million acres of its three-million acre allotment. The decision below—indeed, judgment itself—requires the Secretary to insure that at least 2.4 million acres of arid land "suitable" for Carey Act development will remain available in Idaho. This places an intolerable "freeze" on the public domain, and imposes a severe administrative burden on the Department of the Interior.

To comply with the judgment below, the Secretary must undertake a special inventory of the public lands in Idaho to determine the extent to which 2.4 million acres of "suitable" character are available

and to identify and to preserve such land for future Carey Act projects. Whether an area is "suitable" depends on soil quality and whether it can ever be supplied with water. Making such determination necessarily depends largely on speculation concerning future developments in locating underground sources of water that may be tapped with available and future technology. Because such speculation will doubtlessly involve gross error, much of the land set aside may never actually be claimed under the Act.

In the meantime, the Secretary will be prevented from putting the land to what he believes are higher uses inconsistent with Carey Act development. For example, the Secretary has received 1,400 pending applications under the Desert Land Act, 43 U.S.C. 321, which permits an individual to purchase up to 320 acres of "desert land" for $1.25 per acre on the condition that he irrigate and cultivate it. See Boise District Agricultural Development Draft Environmental Impact Statement for Southwest Idaho, Bureau of Land Management, Boise District Office at 1-1 through 1-2 (1979) (which discusses these and other uses of federal land in Idaho). These applications must be denied to the extent that granting them would defeat the State's "entitlement" under the decision below.

Similarly, under Section 203(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1713(b), the Secretary is authorized to convey desert land of agricultural value "either under the sale authority of this section or in accordance with other



existing law." If the decision below stands, this option would be drawn into doubt for vast stretches of public lands, since the land might be needed to satisfy the State's Carey Act rights.[9] Indeed, all other uses of the land inconsistent with Carey Act development would be foreclosed—all in frustration of the goals of FLPMA, which directs the Secretary to develop land use plans for all public lands in order to insure that they are wisely used. 43 U.S.C. 1701(a)(1), 1712.

Nor is Idaho the only state where such problems are presented. In public-land states other than Idaho, an additional twelve million acres was authorized for Carey Act development. Of this total, only approximately .5 million acres have been patented under the Act. Report of the Director of the Bureau of Land Management, Statistical Appendix, Table 114 (1952). If the decision below is followed, the Secretary will be required to identify and set aside approximately 11.5 million acres of desert land "suitable" for Carey Act development in these states.[10]

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[9] Even if more than 2.4 million acres of such desert land exist in the public domain in Idaho, it is apparent that as the land is disposed of, or put to uses inconsistent with Carey Act development, eventually the amount available for development under the Act will be reduced below the State's entitlement, again preventing the Secretary from properly administering the remaining land.

[10] There is no conflict between the decision below and any decision of any other circuit. All of the land affected by the decision, however, lies principally within the Ninth Circuit and all of it lies in either the Eighth, Ninth or Tenth Circuit. No other litigation concerning the Carey Act is expected in

And those 11.5 million acres also must be closed to all other uses.

Of course, these consequences must be borne if the law requires it. But we may doubt whether it was intended that the states embraced by the Carey Act, having already had eighty-five years to take advantage of the statute, are now free to require that several million acres be identified and set aside indefinitely, so that, if and when they choose, those states may, however belatedly, complete selections. In our submission, no such purpose reasonably can be imputed to the Congress of 1894.

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the Eighth or Tenth Circuit in the foreseeable future. Accordingly, to wait until a conflict develops before reviewing the issue would impose an unnecessary and harsh waiting period of federal land management practices in Idaho and the rest of the Ninth Circuit. The question presented is of substantial importance notwithstanding the absence of a conflict.



## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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AUGUST 1979

## APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 77-1300, 77-1517

STATE OF IDAHO ET AL., PLAINTIFFS-APPELLANTS

*v.*

CECIL D. ANDRUS,* Secretary of the Interior, DEFENDANT-APPELLEE

April 19, 1979

Appeal from the United States District Court for the District of Idaho.

Before ELY and KILKENNY, Circuit judges, and FERGUSON,** District Judge.

PER CURIAM:

Upon the basis of the carefully written opinion of Judge Anderson, reported at 417 F.Supp. 873 (1976), the judgment of the District Court is

AFFIRMED

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* Mr. Andrus is now the Secretary of the Interior. He has been substituted for the original appellee, a then party in his official capacity. Rule 43(c) Fed.R.App.P.

** Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

STATE OF IDAHO, ex rel. CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; AND THE IDAHO WATER RESOURCE BOARD, PLAINTIFFS

*vs.*

THOMAS S. KLEPPE, Secretary of the Interior,
DEFENDANT

MEMORANDUM DECISION AND ORDER

On August 18, 1894, the Carey Act was passed "granting," under certain conditions, one million acres of desert land to the State of Idaho, as well as other desert land states. 43 U.S.C.A. 641. An additional two million acres were "granted" the State of Idaho in 1908. 35 Stat. 577 (May 25, 1908) and 35 Stat. 347, 43 U.S.C.A. 645 (May 27, 1908). On February 21, 1975, the State of Idaho, ex rel. Cecil D. Andrus, Governor, R. Keith Higginson, Director of the Idaho Department of Water Resources, and the Idaho Water Resource Board filed suit against the United States Secretary of the Interior, alleging jurisdiction under the federal question jurisdictional statute, 28 U.S.C.A. 1331 and under the Administrative Procedure Act, 5 U.S.C.A. 701. On Septem-



ber 24, 1975, the Idaho Carey Act Development Association was granted leave to appear in this case as amicus curiae.

Both plaintiff and defendant have filed motions for summary judgment, supported by legal memoranda. The Idaho Carey Act Association has likewise filed memoranda. A hearing was held April 30, 1976, in which all issues before the Court were addressed. The case is submitted and the Court is fully advised in the premises and hereinafter renders its Memorandum Decision and Order incorporating its Findings of Fact and Conclusions of Law.[1]

On July 31, 1975, the Interior Board of Land Appeals rendered its decision affirming a denial of an application by the Idaho Department of Water Resources for a temporary withdrawal pursuant to 43 U.S.C.A. 643. *Idaho Department of Water Resources*, 21 IBLA 210 (1975). The Board rejected the application on the ground that the lands applied for had previously been withdrawn for stock-driveway purposes.[2]

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[1] There are no material issues of fact in dispute; rather, the parties have sought to clearly present issues of law to the Court. As such, it is appropriate to decide this case on the basis of cross-motions for summary judgment. Rule 56, F. R. Civ. P.

[2] The Idaho Department of Water Resources had also applied for land previously withdrawn for reclamation purposes and for a National Wildlife Refuge. The Department, however, did not appeal the ruling with regard to land covered by such withdrawals; rather, the plaintiff has only attacked the ruling pertaining to stock-driveway withdrawals. It is noted,

Plaintiff's first cause of action prays for judgment declaring that the State of Idaho has an absolute right to demand up to three million acres of desert lands under the Carey Act and further declaring that the defendant, through the Bureau of Land Management, has no authority or discretion to deny any request for segregation or withdrawal when presented by the plaintiff. The amicus plaintiffs contend there are two issues involved in plaintiff's first cause of action, namely: (1) whether the State of Idaho has the right under the Carey Act to request withdrawal or segregation of lands which have been previously withdrawn from the public domain or reclassified by action of the federal executive authority, and (2) whether the defendant has the right to withdraw lands from the purview and effect of the Carey Act *after* the State of Idaho has identified such lands as desert lands, selected them, and requested their segregation. *See, Wyoming* v. *United States*, 255 U.S. 489, 41 S. Ct. 393, 65 L. Ed. 742 (1921). The plaintiff and amicus curiae have attempted to present a very broad issue to the Court; however, this Court can decide only actual cases and controversies.[3] To that end the second issue stated

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nonetheles, that plaintiff's argument addresses the nature of the grant and goes much farther than a mere attack on previous withdrawals for stock-driveway purposes. Plaintiff attacks any type of previous withdrawal, save on—a withdrawal for national security or defense.

[3] The controversy must be one that is appropriate for judicial determination, it must be definite and concrete, touching the legal relation of the parties having adverse legal



above and raised by the amicus curiae is not properly before the Court. While the amicus curiae contend there are instances where Carey Act requests have been denied on the basis of prior and subsequent withdrawals, nevertheless, the only final agency action before the Court, as correctly pointed out by the United States, is the decision in *Idaho Department of Water Resources, supra*. 5 U.S.C.A. 704.

I.

The issue, therefore, is whether the defendant, Secretary of the Interior, through his representative, has discretion and authority to deny a State request for temporary withdrawal of desert lands on the ground that the lands were previously withdrawn

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interests, and it must be real and substantial, admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937). A declaration of rights as they stand must be sought, not on rights which may arise in the future and there must be an actual controversy over an issue, not a desire for an abstract declaration of law. *Re Summers*, 325 U.S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795 (1945). There is no actual case or controversy before this Court with respect to denials of Carey Act applications on the ground of subsequent withdrawal or reclassification. The factual matters involved in such denials by the Secretary of the Interior or the reasoning employed to reach the result are not known. Further, even if this Court could hold there was such a case before it, the issue does not arise in a proper framework, since it does not appear that administrative remedies have been exhausted. 5 U.S.C.A. 704. *See Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938).

for stock-driveway purposes. Resolution of the issue necessarily entails examining the nature of the grant to the States under the Carey Act. In construing a statute, the goal, of course, is to determine the legislative intent. Initially, the first inquiry must be the wording itself. The Carey Act states in relevant part:

> "To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is, as of August 18, 1894, *authorized and empowered, upon proper application* of the State *to contract and agree,* from time to time, with each of the States in which there may be situated desert lands . . ., *binding the United States to donate, grant and patent* to the State free of costs for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the said desert-land law, within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; . . .
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> ". . . and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force



> whatever if such map and plan of irrigation shall not be approved.
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> "Any State *contracting* under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; . . .
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> "As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: . . ." (Emphasis added)

The wording of the statute seems quite clear and it is readily apparent that an *in praesenti* grant was not made to the States. Rather, the Act confers upon the States a right to contract with the United States under certain prescribed conditions in order to receive patents for acreages of the public domain. The purpose of the Act, as stated in the first paragraph, is to aid public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts. The same paragraph speaks in terms of binding the United States to donate, grant and patent to the State. However, the so-called binding donation is preceded, and modified by language which authorizes and empowers the Secretary of the Interior, upon proper application of the State, to contract and agree, from time to time, and

approve applications for segregation. The power to contract is the power to bind the United States to donate and patent in accordance with a contract, where the conditions of such contract have been fulfilled.

The Supreme Court, in *Idaho Irrigation Co.* v. *Gooding*, 265 U.S. 518, 44 S. Ct. 618, 68 L. Ed. 1157 (1924) (dicta) spoke of the grant as follows:

> "By the Carey Act the United States binds itself to donate, grant and patent to a state, complying with stated conditions, desert lands, which the state may cause to be irrigated, reclaimed, and occupied. The state is required to file a map of the land proposed to be irrigated, showing the plan of irrigation, etc., and is authorized to make contracts to cause the lands to be reclaimed, and to induce their settlement and cultivation. *Upon satisfactory proof the Secretary of the Interior is directed to issue patents to the state or its assigns.*" 265 U.S. at 521. (emphasis added)

In *Twin Falls Salmon River Land & Water Co.* v. *Alexander*, 260 Fed. 270 (D. C. Idaho 1919), *affirmed*, 267 Fed. 382 (9th Cir. 1920), Judge Dietrich, speaking for this Court, in dicta stated:

> "The primary purpose of the Carey Act was, not to enable the government to divest itself of title to its desert lands, but to secure their irrigation and reclamation; reclamation is the only consideration for the donation or grant, and *is a condition precedent to the exercise of the power to grant.* The authority conferred upon the Secretary of the Interior to convey is expressly lim-



> ited to desert lands, which the state shall have caused to be—
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> 'irrigated, reclaimed, occupied, and not less than twenty acres of each hundred and sixty acre tract cultivated by actual settlers . . . as thoroughly as is required of citizens who may enter under the [said] desert land law.'
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> The Act prescribes a procedure (similar to that required in the case of a desert land entry) for the temporary withdrawal of the lands from private entry, but the preliminary approval of the project by the *Secretary in nowise imposes upon him or implies an obligation to patent. The only purpose of the preliminary showing is to inform him whether the plan is of sufficient apparent merit to warrant a temporary withdrawal of the lands from other forms of entry.*" 260 F. at 274-275.[4] (Emphasis added)

The Eighth Circuit Court of Appeals in *McKinney* v. *Big Horn Basin Development Co.*, 167 Fed. 770 (8th Cir. 1909) also addressed the nature of the grant as follows:

> "The underlying purpose of the Acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given state was, through the agency of the state government more immediately concerned, to speedily have them reclaimed from an unproductive waste by means

[4] The language addressing other forms of entry, while dicta, indicates Judge Dietrich's view that the Secretary of the Interior does indeed have the discretion to deny a request for temporary withdrawal where the land is best withdrawn for other types of uses, and withdrawals therefor.

of artificial irrigation, whereby they might become susceptible of human sustentation, bringing population and wealth to the state. *But Congress did not make the grant to the state of such lands in mass to take effect in praesenti.* The state was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent therefor should issue. It also imposed the condition that the state should not accord to any one person over 160 acres of said lands." 167 Fed. at 775 (Emphasis added)

The language in *McKinney* v. *Big Horn Basin Development Co.* and *Twin Falls Salmon River & Water Co.* v. *Alexander* reflect a view consistent with the language of the Act and can be read to state that an outright grant did not occur under the Carey Act.[5]

The legislative history of debate on the Carey Act reflects a position by the representatives that it

[5] The language quoted from the above cases is ditca and for that reason is not controlling. Notwithstanding the overbroad language in *Idaho Irrigation Co.* v. *Gooding*, an *in praesenti* grant of title did not occur under the Carey Act; rather, in 1894, as this opinion further develops, the States were given a right of entitlement to contract with the Secretary of the Interior for one million acres of desert land suitable for irrigation, cultivation and settlement. The cases cited, however, do offer some insight with regard to the nature of the grant, and the thoughts expressed by Judge Dietrich in *Twin Falls Salmon River Land & Water Co.* v. *Alexander* are in accord with the language of the Act itself and the legislative history.



was not to be an absolute gift as occurred under the Swamp Land Act of 1850. *United States* v. *Louisiana*, 127 U.S. 182, 8 St. Ct. 1047, 32 L. Ed. 66 (1888). A letter from S. W. Lamoreux, Commissioner, Office of the Secretary of the Interior, was introduced in the House and indicates the type of grant anticipated under the Carey Act. The letter, in part, states:

> "The people of the States in which the arid lands are located would like to see the United States undertake their reclamation. This is certainly impracticable now, and it is doubtful whether it will ever be otherwise. There are those who think that the arid lands should be given to the States under certain restrictions. Public sentiment would scarcely justify such legislation at this time. The experience of the United States and the several States under the swamp-land acts does not argue in favor of such disposal of the arid lands . . ."
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> "The principal proposition involved, reclamation and settlement by individuals in small holdings, meets my strong approval, and this bill seems to me to present full opportunity for the practical experiment and under proper safeguards. The United States retains title until reclamation is accomplished and the land occupied by actual settlers. This, if successful, is the great object to be attained; and if unsuccessful the United States still holds the unincumbered fee." 26 Cong. Rec. 8390 (1894).

The following passages from the Congressional Record amplify the nature of the grant from the viewpoints of a supporter of the House bill, as well as opponents of the same:

> "Mr. PICKLER. . . . The proposition that is now before the House is one that has been approved by the Commissioner of the General Land Office and I think there can be no objection to it. Gentlemen will remember how sensitive this House has shown itself from time to time in regard to making direct appropriations for the irrigation and reclamation of arid lands. Now, here is a proposition which costs the Government nothing, but simply donates these lands to the States, leaving them to bear the burden of irrigation and reclamation of arid lands. Furthermore, it is provided that the title to these lands shall not pass to the States until it is shown to the satisfaction of the Secretary of the Interior that the lands have been reclaimed according to law and the money expended upon them." 26 Cong. Rec. 8391

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"Mr. McRAE. Mr. Speaker, as I have already stated, I do not approve of legislating in this way. . . .

"At the suggestion of the conferees on the part of the House, this substitute for the Senate proposition was prepared, because they were not satisfied with that of the Senate. If anything is to be done at this time it should be carefully guarded so as to protect the United States against fraud in the proof of reclamation.



"Now, Mr. Speaker, I want to state briefly what I understand to be the main difference between the two propositions. The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period. It leaves the question of irrigation to be determined under rules and regulations to be made by the States themselves. In short, the States will decide whether they have complied with the conditions as to irrigation. The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated for the reclamation of not exceeding a million acres in each State, the question of irrigation to be finally determined by the Executive officers of this Government. No reservation or withdrawal is permitted except for temporary purposes until the plan is approved; and no title is to pass until thorough irrigation is accomplished and shown to the satisfaction of the Interior Department." Id.

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"Mr. McRAE. If this substitute be adopted it will only authorize contracts which will lapse in ten years after their date. It is not a legislative grant; it does not require any action of Congress for its forfeiture. It does not even put the land in a state of reservation until a map is filed and the plan of irrigation is approved." Id.

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"Mr. CANNON of Illinois. Mr. Speaker, it is with very much diffidence that I take the floor to

say anything about the Senate Amendment or the proposed substitute to this bill. . . . I want to express a doubt, however, about the wisdom of legislation of this kind upon the sundry civil or any other appropriation bill.

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"But I very much doubt whether the proposed provision will bear good fruit. I recollect—I do not recollect, but all of us know—that in 1850 there was a grant of swamp land to the various States—Minnesota, Illinois, Arkansas, and all of the States that had public lands of that character. The question presented then was to get rid of the water in certain sections. This is a proposition to supply the water in certain other sections.

"Now, I must say that the operations of the swamp-land grant act was not satisfactory. Great lots of land were selected, for instance, in my own State of Illinois, the most valuable agricultural lands we have now, and great claims of indemnity are still pending in some of the States, so that that appropriation of land in the main was worse than wasted—not properly considered, not properly guarded." Id. at 8392.

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"Mr. PICKLER. Mr. Speaker, I desire to say, in reply to the gentleman from Illinois, that for probably ten or twelve years this matter of irrigation in the arid regions has been before Congress, has been discussed, has been talked about, and we have so far failed to get any legislation in regard to the matter—an utter failure in any legislation. Now, this subject is well understood by the House of Representatives. Everybody knows that the land is lying out there. They know that it is useless; and everybody desires it reclaimed. It is a very simple proposition; and the answer to the objection of the gentleman from Illinois is this: that where this differs from the swamp-land grants is that the Government does not grant this at all. The Government only grants it and the State only receives title to it after it has made its proof that the land is reclaimed. So this does not pass to the States as the swamp land passed to the States." Id.



"Mr. VAN VOORHIS of New York. If the States should disregard the restrictions, is there any remedy?

"Mr. NEWLANDS. I presume there is.

"Mr. PICKLER. This amendment provides that the lands shall not be ceded to the States until they have complied with the regulations prescribed by the Secretary of the Interior." Id. at 8427.

"Mr. McRAE. . . . The Senate amendment is in my judgment extremely dangerous, and should not be adopted.

"On yesterday I pointed out some of the objections to it, but since the gentleman from South Dakota has abandoned it and is satisfied to adopt the substitute which I offered, it is not now necessary to discuss it further. I would prefer to see no legislation at this time and in this way, but if the question can not be postponed for a more careful consideration then we should pro-

ceed with all the caution and care that is possible under the circumstances, for the legislation is important and far reaching. The amendment does not appear to be understood by some who have opposed it. It has been likened to the swampland grant of September 28, 1850.

"That was a grant *in presenti* and passed the title as of the date of the grant. This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed. That act passed the title to the whole of the swamp and overflowed lands which were unfit for cultivation and unsold at that time to the States. This grants nothing and authorizes no conveyance until reclamation.

> "There was no limit to the swamp land grant as to the area to be taken or the time when it should be selected. Under this bill the area to each State is limited to 1,000,000 acres and the time for reclamation ten years after contract. Under the swamp land grant the States were left free to dispose of the lands before reclamation and without any limitation as to the quantity that could be sold to one person. Under this amendment the States must reclaim the land before they get it and must provide for its settlement and occupancy by bona fide settlers, and can not sell exceeding 160 acres to any one person." Id. at 8431.

While the policy underlying a legislative enactment normally need not be considered when the meaning of the act is clear, nevertheless, it does offer insight



into the legislative intent. The Carey Act represents a deliberate policy change in contradistinction to the outright grants of the swamp land acts and entrusted the Secretary of the Interior with broad discretion through his power to contract with the States.

Administrative interpretation of a statute is an important construction aid to identify the legislative intent and is entitled to considerable weight where the administrative interpretation is close in time to the pasage of the Act, and has endured the passage of time. *Sunray Mid-Continent Oil Co.* v. *F. P. C.*, 364 U.S. 137, 80 S. Ct. 1392, 4 L. Ed. 2d 1623 (1960). The Department of the Interior held the view in 1908 that the Carey Act was not an *in praesenti* grant, but rather invested the Secretary of the Interior with discretion to contract with the end in mind of patenting acreage to the States.

> "It is clear from the terms of the act of August 18, 1894, *supra*, under which the application of the State is filed, that the acceptance of the offer of the State is a matter wholly within the discretion of the Department. The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescence of both parties thereto without a right in either to insist upon a proffer or acceptance by the other. It is equally clear that when the lands made the subject-matter of the proposed contract have been set aside for other purposes, the Secretary of the Interior, as the authorized representative of

the Government in such matters, is fully warranted in declining to enter into any contract with the State which would defeat the object for which the lands were set aside. The State has no right to insist that he should. As his discretion is not subject to control by the State, a hearing for the purpose of determining whether or not that discretion has been properly exercised can not be demanded by the State. So long as a withdrawal made by him under authority of law remains unrevoked the presumption so far as third persons having no interest in the land withdrawn are concerned, that his discretion was properly exercised is conclusive, and so long as such withdrawal remains in force the land covered thereby is not subject to any claim of the State under the Carey Act." *State of Wyoming*, 36 L. D. 399-400 (1908).

That an *in praesenti* grant of title did not occur under the Carey Act seems quite clear from the language of the Act, the legislative history, administrative interpretations, and court interpretations, albeit dicta. It is likewise clear, however, that the Carey Act and subsequent enactments conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement. The State is guaranteed a maximum entitlement of three million acres of suitable desert land for Carey Act development to select from time to time, which it cannot be deprived of by the Secretary of Interior, if the State meets the conditions of the Carey Act. However, the State may not perfunctorily select acreage previously withdrawn for



other purposes such as in this case a withdrawal for stock-driveways. The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act. To the extent the land has been withdrawn for other purposes by the Secretary and the State remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry. The Secretary may not arbitrarily deny the State's application for reclassification, withdrawal and Carey Act segregation. The Secretary's ruling, once final, is reviewable under the standards set forth in *Bronken* v. *Morton*, 473 F. 2d 790 (9th Cir. 1973), *cert. denied*, 414 U. S. 828, 94 S. Ct. 51, 38 L. Ed. 2d 62 (1973), *Richardson* v. *Udall*, 253 F. Supp. 72 (D. C. Idaho 1966), and the Administrative Procedure Act, 5 U.S.C.A. § 706. Such a construction of the Carey Act is consistent with 43 U.S.C.A. 315f and its proviso empowering and directing the Secretary to classify the public lands as more valuable or suitable for certain purposes upon application by a qualified applicant. *See, Bleamaster* v. *Morton*, 448 F. 2d 1289 (9th Cir. 1971). The Court does not accept the State's argument that it is absolutely entitled to select *any* land on the public domain for Carey Act development, for such a construction does not comport with the wording of the Act, its legislative history, other acts of Congress regarding the

public domain, as well as the broad discretion invested in the Secretary of Interior as manager of the public domain.

II.

The second issue before the Court is whether a husband and wife may make adjoining entries of 160 acres each under the Carey Act and whether a residence constructed on the dividing line between the two entries satisfies the settlement requirement of the Act.

In 1974 the Idaho Legislature amended the State's Carey Act in pertinent part as follows:

> "For the purpose of any drawing and/or selection of land for entry under this section or section 42-2013A, Idaho Code, a husband and wife shall be allowed to join their entries and receive a total of three hundred twenty (320) acres in one drawing or selection." 42 Idaho Code § 2013 (1974).

Relevant language of the Carey Act provides:

> "As fast as any State may furnish satisfactory proof . . . that any of said lands are irrigated, reclaimed and occupied by actual settlers, patent shall be issued to the State . . .: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person . . ." 43 U.S.C.A. § 641.

On August 29, 1974, the Deputy Solicitor to the Director of the Bureau of Land Management issued an opinion which the United States represents is the final agency position on the matter.



In concluding that Section 2013, Idaho Code, Title 42, is at odds with the legislative purpose and Department of Interior precedent, the Solicitor states that it is not possible for both a husband and wife who are not separated to qualify for 160 acres each since it is presumed that they will share the same residence and this mutual residence can only be located on one 160-acre tract. The underlying reasoning of the Solicitor's opinion is that from the overall context of the Act, the phrase "any one person" in the proviso means "actual settler," as the latter phrase is used to modify the phrase "any one person." Based on Department of the Interior precedent, the term "actual settler" has an established meaning of "actual resident." Further, the Solicitor reasons that "actual resident" means that a family is entitled to only one 160-acre tract. The Court has no difficulty accepting the Solicitor's first step, namely, that an actual settler is a person who goes upon the land with the intent of making it his home. *United States* v. *Atterbury*, 10 L.D. 36 (1890), *State of Oregon*, 36 L.D. 36 (1908). It is most difficult for this Court to accept the Solicitor's second step, i.e., that the phrase "actual resident" envisions one family per 160-acre tract, in light of the actual language used in the statute.

A number of rules of statutory construction were employed in the first part of this opinion and those rules are equally applicable here. The wording of the statute is free from ambiguity as the word "person" is modified by the word "one." While the word-

ing excludes more than one Carey Act entry per person, to read the word "person" to mean "family" or "husband and wife" rewrites the statute.

Since the wording of the Act is free from ambiguity, the legislative history need not be consulted, yet, in order to gain further insight into the intent, the Congressional Record may be consulted. The history does not reveal that a different meaning was intended than the literal meaning of the words used. The following passages support a literal interpretation of the statute, and, although the debate reflects a desire to effectuate development of homes upon the desert domain, such a desire fails to indicate that a husband and wife were excluded from making a 160-acre entry each.

In the House, the Senate Report prepared by Mr. Carey was read in the record. The report states in part:

> ". . . The title is not to pass out of the Government until the two chief conditions of the bill are fully complied with. First, that the lands shall be fully reclaimed; and second, that the land shall be settled upon in tracts not exceeding 160 acres to *each settler*.
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> "If the States complied with the conditions of the act, the lands would be reclaimed, settled upon, and disposed of to actual settlers in small tracts thereby accomplishing the same purpose as is contemplated by the homestead laws of the United States." 26 Cong. Rec. 8390 (1894) (Emphasis added)



Commissioner Lamoreux stated, in part, in a letter introduced in the House:

> "* * * * *
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> "The bill further provides that when competent proof is furnished by any State that any of the lands reserved are reclaimed and occupied by actual settlers, in tracts not exceeding 160 acres to *each settler*, patents shall issue to the State or its assignees for such lands so reclaimed and settled in tracts not exceeding 160 acres to *each person*, . . ." Id. (Emphasis added)
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> "Mr. McRAE. . . . One of the conditions of this measure is that not exceeding 160 acres shall be sold by the State to any *one individual*." Id. at 8391.
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> "Mr. BRYAN. . . . But certainly no one will object to allowing these States to take these lands, useless to us as a nation, and irrigate them, make them valuable, and then sell them to *citizens who will establish homes* upon them. This amendment provides that these lands shall not be disposed of in greater quantities than 160 acres to *one person*." Id. at 8419 (Emphasis added)
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> "Mr. BRYAN. . . . It seems to me, Mr. Speaker, that this measure gives a promise of very great good, because the more *homes* we can establish, the more independent citizens we can put upon our lands, the more stable is the Government under which we live, and the more general will be our prosperity . . ." Id. at 8420 (Emphasis added)

"Mr. HERMAN. . . . Let the bill so protected be passed, for our people will welcome it as the best we can secure, and while we are doing this it behooves us to guard every provision which otherwise may be construed adversely to the interests of the real beneficiaries for whom this legislation is had—the *home-seeking* and *home-deserving* people of the United States . . ." Id. at 8424 (Emphasis added).

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"Mr. ELLIS of Oregon. . . . This act, is passed, does not suspend the desert land act, nor prevent those who desire to take land directly from the Government from doing so, provided they comply with the law, rules, and regulations. It only enables the State to do what the individual by reason of poverty can not do, and after it has made the land fertile and the prospect of obtaining an easy living therefrom, then the man who could not accomplish the result alone may come in and *purchase for himself and family a home,* his success will be assured, and the State or General Government will in no sense be losers . . ." (Emphasis added) Id. at 8425.

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"Mr. LUCAS. . . . It seems to me that the bill is explicit and careful in its provisions, guarding all the rights of the Federal Government. The title can not pass to the State until reclamation is secured and then must be awarded to settlers in *160-acre lots for bona fide homes.*" Id. at 8430 (Emphasis added)



Even if the phrase "any one person" could have different meaning, the Government's construction is out of harmony with the rule of construction used by the Secretary, namely, where words admit of different meanings, it would be right to adopt that which is more favorable to the interests of the public. *J. B. Raymond,* 2 L.D. 854 (1884).

The Secretary relies heavily on Land Decisions under the Homestead Act. Such decisions hold that two entries by a husband and wife are precluded by the Act and further, that a house constructed on the dividing line between two tracts will not validate such entries. *Case* v. *Kupferschmidt,* 30 L.D. 91 (1900), *Jane Mann,* 18 L. D. 116 (1894), *Lincoln* v. *Gisselberg,* 17 L. D. 215 (1893), *William A. Parker,* 13 L. D. 734 (1891), *Stella G. Robinson,* 12 L. D. 443 (1891), *Emma F. Stewart's Heirs,* 12 L. D. 197 (1891), *John O. and Minerva C. Garner,* 11 L. D. 207 (1890), *Bullard* v. *Sullivan,* 11 L. D. 22 (1890), *Thomas E. Henderson,* 10 L. D. 266 (1890), *L. A. Tavener,* 9 L. D. 426 (1889). *But see*: *Bloom* v. *Holmes,* 44 L. D. 148 (1915), *Patrick Flynn,* 39 L. D. 593 (1911), *Anderson* v. *Hillerud,* 33 L. D. 335 (1904), *Emily M. Dronberger,* 10 L. D. 88 (1890).

The above decisions were issued pursuant to the Homestead Act and for that reason they cannot be precedent for construing the Carey Act. Each statute has different wording, and the Secretary has recognized that the Department's rulings are controlled

by the language used in the act in question.[6] *Selway* v. *Flynn*, 6 L. D. 541 (1888). In *Selway* v. *Flynn*, which involved entry by a married woman under the Desert Land Act, the ruling subject of the appeal was as follows:

> "I am of the opinion that the desert land act should be construed with reference to the relations and disqualifications of coverture at common law and as it forbids more than one entry of six hundred and forty acres by one person that it did not intend that a maried man and woman should each be allowed an entry thereunder. I am aware that there have been decisions holding to the contrary, but with my views on the subject, I must decline to follow said precedents. I therefore sustain your original decision rejecting Mrs. Selway's application . . ." *Supra*, at 542.

On appeal the Commissioner reached a contrary result in light of the language of the Desert Land Act:

> "I cannot agree with you that the law providing for the sale of desert lands prohibits the entry thereunder by a married woman. The statute provides:—
>
> 'It shall be lawful for any citizen of the United States or any person of requisite age who may be entitled to become a citizen, and who has filed

[6] *See also*: the reasoning and analysis of statutory language in *Delila* v. *Stukel*, 10 L. D. 47 (1890) holding valid an entry by a married woman under the Timber & Stone Act of 1878 and ruling that such an interpretation was consistent with construction of the wording used in the Desert Land Act.



> his declaration to become such, and upon payment of twenty-five cents per acre to file a declaration, etc.'
>
> "In the face of these provisions of the statute I have discovered no good reason for changing the construction of the law adopted by this Department in former decisions." Id.[7]

While residence on the land is not required under the Desert Land Act, *Cox* v. *Hart*, 270 Fed. 51 (9th Cir. 1921), *affirmed*, 260 U.S. 427, 43 S. Ct. 154, 67 L. Ed. 332 (1922), that does not command a different result for it is the wording and its clear meaning of the Carey Act which is controlling. To the extent that the rulings previously referred to under the Homestead Act were premised on a presumption that a wife's residence is that of her husband, it is notable that Idaho, by Section 2013, Idaho Code, Title 42, has seen fit to permit both husband and wife to make entry.[8] More importantly, to premise a denial of the right to make an entry upon such a presumption would, as has previously been stated, flout the language of the Carey Act.

[7] On September 30, 1910, the Department of the Interior issued a circular as follows:

> "Thus, a woman, whether married or single, who possesses the necessary qualifications, can make a desert-land entry, and, if married, without taking into consideration any entries her husband may have made."
>
> 39 L.D. 253 (1910)

[8] To deny either a husband or wife the right of entry on the ground that either has previously made an entry may have constitutional ramifications; however, that issue is not addressed in this Memorandum Decision.

This Court is not aided in this part of the Memorandum Decision by a contemporaneous opinion of the Department of the Interior at the time of passage of the Act; rather, the Department has relied upon precedent from other acts which are not controlling. All total, it follows under the language of the Carey Act, legislative history, as well as Department constructions of acts with closely-similar language, that a husband and wife are each entitled to make a 160-acre entry.

This court is of the view that since a husband and wife are entitled to make adjoining entries under the Carey Act of 160 acres each, that a house on the dividing line between the adjoining tracts satisfies the settlement and residency requirement. It is not contested that an actual residence on the tract is required. To require a husband and wife to divide their home by a breezeway or the like, or to construct separate residences on each tract would cause disutility. Such an economic restraint may well prohibit settlement in conflict with the intent of the Act. To impose such a restriction strikes this Court as an illogical selection of form over substance.

Moreover, construction of a house on the dividing line is permitted under case law and satisfies the residence requirement. *Silver* v. *Ladd*, 74 U.S. 219, 19 L. Ed. 138 (1869), *following*, *Lindsey* v. *Hawes*, 67 U.S. 554, 17 L. Ed. 265 (1863); *see also: George T. Burns*, 4 L. D. 62 (1885), *So. Pac. R. R. Co.* v. *Rahall*, 3 L. D. 321 (1885), *Wright* v. *Woods*, 1 C.L.L. 304 (1875).



The defendant's motion for summary judgment is GRANTED as to the issue in Part I of this decision. The decision of the Interior Board of Land Appeals (21 IBLA 210) is AFFIRMED as stated in Part I of this decision.

The plaintiffs' motion for summary judgment as to the issues discussed in Part II of this decision is GRANTED.

Within five (5) days from the date of receipt of a copy of this Memorandum Decision and Order, counsel for each of the parties will prepare and submit to the court a proposed summary judgment effectuating this decision and order.

DATED this 15th day of July, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States District Judge

## APPENDIX C

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

IDAHO DEPARTMENT OF WATER RESOURCES

IBIA 75-357 Decided July 31, 1975

Appeal from the decision of the Idaho State Office, Bureau of Land Management, partially rejecting an application for a temporary withdrawal of lands for proposed development under the Carey Act of 1894.

Affirmed.

1. Act of March 5, 1910—Act of August 18, 1894 (Carey Act)—State Selections—Withdrawals and Reservations: Stock-driveway Withdrawals

   An application filed by a State under the Act of March 5, 1910, for a temporary withdrawal of lands to aid in the selection of the lands for proposed development under the Carey Act of 1894 must be rejected where the lands are withdrawn for stock-driveway purposes, and cannot be suspended pending consideration of a petition for reclassification of the lands as suitable for selection under the Carey Act.

2. Act of March 5, 1910—Act of August 18, 1894 (Carey Act)—State Selections—Withdrawals



and Reservations: Stock-driveway Withdrawals

A grant of lands to a State under the Carey Act of 1894 is not a grant *in praesenti*, vesting title to any particular lands as of the time of passage of the act or by relation back upon fulfillment of the conditions imposed by the act, but the allowance or rejection of an application by a State under the Act of March 5, 1910, for a temporary withdrawal of lands to aid in the selection of the lands for proposed development under the Carey Act is a matter wholly within the discretion of the Department; and where the lands sought to be selected by the State are embraced within a stock-driveway withdrawal made by the Secretary of the Interior under authority of law, they are not, so long as such withdrawal remains in force, subject to any claim of the State under the Carey Act.

APPEARANCES: Nathan W. Higer, Esq., Office of the Attorney General, State of Idaho, Boise, Idaho, for appellant; Riley C. Nichols, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for appellee, Bureau of Land Management.

OPINION BY ADMINISTRATIVE
JUDGE LEWIS

The State of Idaho through its Department of Water Resources filed an application pursuant to the Act of March 15, 1910, 43 U.S.C. § 643 (1970), for the temporary withdrawal of some 27,400 acres of land for proposed development under the Carey Act

of 1894, 43 U.S.C. §§ 641 *et seq.* (1970), by the Lake Side Irrigation Project.

The Carey Act of 1894 reads, in applicable part:

> To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is * * * authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the * * * [desert-land law, 43 U.S.C. §§ 321 *et seq.*] binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the said desert-land law, within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if actual construction of reclamation works is not begun within three years after the segregation of the lands or within such further period not exceeding three years, as shall be allowed by the Secretary of the Interior, the said Secretary of the Interior, in his discretion, may restore such lands to the public domain; * * *.



The Act of March 10, 1910, *supra*, authorized temporary withdrawals upon application by the states to aid in carrying out the purposes of the Carey Act.[1]

By decision of January 24, 1975, the Idaho State Office, Bureau of Land Management (BLM), rejected the application in part because some of the lands are embraced in various withdrawals and are not available for selection under the Carey Act, including the following-described lands which are withdrawal for stock-driveway purposes under Stock Driveway No. 25 by order issued on August 18, 1955:

> T. 9 S., R. 25 E., B.M., Secs. 13, 14, 15, 24, 25
> T. 9 S., R. 26 E., Secs. 19, 20, 21, 22, 23, 24, 25
> T. 9 S., R. 27 E., Secs. 27, 28, 29, 30

The Idaho Department of Water Resources appealed to this Board only from that part of the decision which rejected the above-described lands included in the stock driveway withdrawal.[2] At the

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[1] We note that the regulations pertaining to the Carey Act were last published in 43 CFR 2222.6-2222.6-6 (rev. January 1, 1970), these pertaining to temporary withdrawals under the 1910 act being 43 CFR 2222.6-2. These sections, among others, were deleted by an order in 1970 as unused or obsolete. *See* 35 F.R. 3072.

[2] Thus, the decision has become final as to its rejection of the following-described lands for the reasons given:

> "Withdrawn for Reclamation Purposes for the Minidoka Project:
>
> T. 9 S., R. 25 E.
>
> Sec. 12, All;
>
> Sec. 15, W 1/2 NW 1/4;
>
> Sec. 23, NE 1/4 NE 1/4 SW 1/4.

[Footnote continued on page 34a]

same time that it filed its statement of reasons for appeal, appellant also filed with the Board a petition by the Lake Side Irrigation Project Association under section 7 of the Taylor Grazing Act, 43 U.S.C. § 315f (1970), for reclassification of these lands in the stock-driveway withdrawal as suitable for use under the Carey Act.

[1] In its first point on appeal, the appellant argues that its application for a temporary withdrawal of the lands withdrawn for stock-driveway purposes should have been suspended, and not rejected, pending a decision on the petition filed with this Board for reclassification of the lands as suitable for disposition under the Carey Act.

Although this contention may seem plausible at first glance, it is not tenable under the regulations. 43 CFR 2313.1(c) of the stock-driveway regulations provides that:

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[2] [Continued]

T. 9 S., R. 27 E.,

Sec. 20, N 1/2.

"Withdrawn for the Minidoka National Wildlife Refuge by Executive Order 8600:

T. 9 S., R. 27 E.,

Sec. 20, N 1/2.

"The following described lands are included in State Exchange application I-8154. In accordance with the regulations of 43 CFR 2091.2-3, these lands are segregated from appropriation under the public land laws:

T. 9 S., R. 25 E.,

Sec. 33, SE 1/4 NE 1/4, SE 1/4;

Sec. 34, S 1/2 SW 1/4, SE 1/4;

Sec. 35, S 1/2."



> Lands withdrawn for driveways for stock * * * are not subject to entry or disposition, and applications for the acquisition of lands so withdrawn will be rejected by the authorizing officer. * * *

Therefore, BLM properly rejected appellant's application. The rejection of the application was also mandated by general regulation 43 CFR 2091.1 which provides in pertinent part that:

> * * * applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by:
>
> (a) Withdrawal or reservation of lands * * *

Furthermore, the Department has consistently held that an application for withdrawn lands must be rejected, and it is impermissible to hold the application in suspense until the land may become available. *Juan N. Menchaca*, 14 IBLA 212 (1974); *Robert M. Ford*, 4 IBLA 321 (1972); *Reed L. Adams*, A-30950 (October 16, 1968).

Accordingly, the application must be rejected and cannot be suspended pending consideration of the petition for reclassification of the lands as suitable for selection under the Carey Act.

With respect to appellant's second argument on appeal, appellee's answer to appellant's statement of reasons on appeal ably and correctly discusses the facts and the applicable law, with which we agree.

Accordingly, we adopt appellee's discussion as hereinafter set out in toto.

[2] In Appeal Point No. 2, appellant argues, in effect, that the State's right to segregate and withdraw land under the Carey Act of 1894, *as amended*, vested at the time of passage of the Act and, therefore, takes precedence over subsequent withdrawals and other uses which the Secretary may consider more appropriate. The argument assumes that the Carey Act grant was a grant *in praesenti* and that the Secretary has no discretion in deciding whether or not to withdraw and segregate particular lands when requested to do so by a qualified State. These assumptions are contrary to the language of the statute and Departmental and judicial precedents.

Thus, the statute is couched in discretionary language, authorizing and empowering—not requiring—the Secretary to contract and agree with the states to donate, grant, and patent lands. The discretionary nature of the Carey Act was discussed in *State of Wyoming*, 36 L.D. 399, 399-400 (1908), as follows:

> It is clear from the terms of the act of August 18, 1894, *supra*, under which the application of the State is filed, that the acceptance of the offer of the State is a matter wholly within the discretion of the Department. The filing of the application is preliminary to the formation of a contract between the State and the United States. It is manifest that the formation of such contract depends upon the acquiescense of both parties thereto without a right in either to insist upon a proffer or acceptance by the other. It is



> equally clear that when the lands made the subject-matter of the proposed contract have been set aside for other purposes, the Secretary of the Interior, as the authorized representative of the Government in such matters, is fully warranted in declining to enter into any contract with the State which would defeat the object for which the lands were set aside. The State has no right to insist that he should. As his discretion is not subject to control by the State, a hearing for the purpose of determining whether or not that discretion has been properly exercised can not be demanded by the State. So long as a withdrawal made by him under authority of law remains unrevoked the presumption, so far as third persons having no interest in the land withdrawn are concerned, that his discretion was properly exercised is conclusive, and so long as such withdrawal remains in force the land covered thereby is not subject to any claim of the State under the Carey Act.

With respect to the nature of the grant contemplated by the Carey Act, *as amended*, it is clear from the language of the Act that the grant was not intended as a grant *in praesenti*, vesting title to any particular lands as of the time of passage of the Act or by relation back upon fulfillment of the conditions imposed by the Act. Thus, the Act merely authorizes the Secretary to contract in the future with the various states to grant them a maximum quantity of desert lands upon the fulfillment of certain conditions. The Act does not use the phrase "hereby granted" which Congress would have inserted had it

intended the grant to be one *in praesenti.* Furthermore, the courts and the Department have consistently held that the Carey Act was not intended as a grant *in praesenti.*[3]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and the case is returned to the BLM for initial consideration of the petition for reclassification of the lands in the stock-driveway withdrawal, and for further action on the remaining lands in the application for temporary withdrawal.

/s/ Anne Poindexter Lewis
ANNE POINDEXTER LEWIS
Administrative Judge

We concur:

/s/ Frederick Fishman
FREDERICK FISHMAN
Administrative Judge

/s/ Martin Ritvo
MARTIN RITVO
Administrative Judge

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[3] *E.g., McKinney* v. *Big Horn Basin Development Co.*, 167 Fed. 770 at 775 (8th Cir. 1909); *State ex rel. Armington* v. *Wright*, 44 Pac. 89 at 92 (Mont. 1896); *Carey Act Selections*, 48 L.D. 160 (1921). *Cf. State of Wyoming*, 36 L.D. 399 (1908).



**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-75-22

STATE OF IDAHO, EX REL. CECIL D. ANDRUS, Governor; R. KEITH HIGGINSON, Director, IDAHO DEPARTMENT OF WATER RESOURCES; AND THE IDAHO WATER RESOURCE BOARD, PLAINTIFFS

—*vs*—

THOMAS S. KLEPPE, Secretary of the Interior,
DEFENDANT

AMENDED SUMMARY JUDGMENT

This matter was heard by the court on April 30, 1976, on cross-motions for summary judgment and again on August 26, 1976, on defendant's motion for clarification and reconsideration following the entry, on July 15, 1976, of the court's Memorandum Decision and Order. All parties and amicus curiae appeared by their respective counsel at both hearings and the court having fully considered and reconsidered the records, files, briefs and all oral arguments, and there being no genuine material issues of fact, summary and declaratory judgment was entered on August 27, 1976. By subsequent orders of the court entered on September 4 and November 15, 1976, the judgment was amended to correct particular oversights, thereby conforming the judgment to the in-

tent of the court. The amended judgment is entered reflecting all oversight corrections as follows:

IT IS HEREBY ORDERED and ADJUDGED that plaintiffs' prayer for a declaration that they have an absolute right to demand three million acres of the public domain (as reduced by prior patents issued pursuant to the Carey Act) without any regard to previous classifications and withdrawals made by defendant, acting pursuant to lawful authority, is DENIED, and the decision of the Interior Board of Land Appeals (21 IBLA 210) is AFFIRMED.

IT IS FURTHER ORDERED, ADJUDGED and DECLARED HEREBY, that plaintiff, State of Idaho, by reason of the expressed Congressional purposes and the terms and conditions of the Carey Act, is entitled to have withdrawn and patented three million acres of the desert lands in the public domain (as reduced by prior patents issued pursuant to the Carey Act) situate in the State of Idaho for entry under said Act, providing that there are sufficient lands of such kind, quality and character within the State of Idaho, and providing that the State of Idaho satisfies all of the terms and conditions of said Act so as to entitle it to contract with the defendant, acting for the United States of America, in order to carry out the expressed purposes of said Carey Act.

That by reason of the expressed Congressional purposes and the terms and conditions of the Carey Act, the United States of America, acting by and through the defendant, has bound itself to contract, donate,



grant and patent to the State of Idaho, upon compliance with the stated conditions, desert lands, which the State may cause to be irrigated, reclaimed and occupied by actual settlement, but not to exceed three million acres, as that sum may be reduced by prior patents issued pursuant to the Carey Act.

IT IS FURTHER ORDERED, ADJUDGED and DECLARED HEREBY that as to desert lands remaining in the public domain presently withdrawn by the defendant for other purposes, and where the State of Idaho determines that it desires to initiate a Carey Act development on such lands, the State's remedy is to petition the defendant for temporary withdrawal under 43 U.S.C. Sec. 643 and/or under 43 U.S.C. Sec. 315f, and it is the duty of the defendant to entertain and act upon said petition or petitions in accordance with the public land laws of the United States of America and in accordance with due and proper administrative procedures.

IT IS FURTHER ORDERED, ADJUDGED and DECLARED HEREBY, that:

(1) Each person is entitled to enter 160 acres and not just 160 acres for each family unit, and

(2) A single family residence built on the common boundary line between entries of a husband and wife shall satisfy the residence and actual settlement for both 160 acre entries, as required by the Carey Act.

The motion of defendant for clarification or reconsideration is DENIED.

Each party shall bear its own costs.

DATED this 15th day of November, 1976.

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States Circuit Judge
Sitting By Designation



**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DC #1-75-22JBA
No. 77-1300
No. 77-1517

STATE OF IDAHO, APPELLANT

*v.*

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
APPELLEE

April 19, 1979

Appeal from the United States District Court for the District of Idaho.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Idaho and was duly submitted. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and hereby is affirmed.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 298683 52